

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-20

216-2022-CR- 2372

RESPONSE TO STATE’S PARTIAL OBJECTION TO MOTION *IN LIMINE* RE:
ALLEGATIONS OF PRIOR OR SUBSEQUENT BAD ACTS

Now comes Adam Montgomery, by and through his Public Defenders, Caroline L. Smith, Esq., and James T. Brooks, Esq., and hereby responds to the State’s partial objection to Mr. Montgomery’s motion *in limine* re: allegations of prior or subsequent bad acts, respectfully stating as follows:

1. Adam Montgomery is scheduled for a February 6, 2024 jury selection on charges of second degree assault and second degree murder as well as other charges relating to the death of Harmony Montgomery.
2. Prior to the deadline for the filing of any motions *in limine* to either admit or excluded evidence under Rule 404(b), Montgomery filed a timely motion to exclude evidence of other bad acts in eleven separate categories labelled “a.” through “k.”
3. This response to the State’s partial objection incorporates all prior arguments and requests for relief within Montgomery’s initial pleading. The limited purposes of this response are to clarify the distinction between Rule 404(b) evidence and the “intrinsically intertwined” exception and request particularity from the State so that Montgomery may meaningfully address the State’s partial objection at an evidentiary hearing.
4. Montgomery was charged with the instant offenses prior to March 1, 2023. Accordingly, the applicable discovery rule is former New Hampshire Rule of Criminal Procedure 12(b)(1)(F), which obligates the State, within forty-five days after the entry of a not guilty plea, to provide notice of its “intention to offer at trial Rule of Evidence 404(b) evidence of other crimes, wrongs,

or acts committed by the defendant.” Here, the State has never provided notice of its intention to introduce Rule 404(b) evidence of other crimes, wrong, or acts committed by Montgomery. As a result, all evidence of other bad acts pursuant to Rule 404(b) should be excluded. See N.H. R. Crim. P. 12(b)(9)(C) (potential sanctions for failing to comply with notice obligation include “prohibiting the party from introducing the evidence not disclosed”).

5. Not only has the State failed to ever provide a notice of intent to introduce evidence of other bad acts, but it has also failed to even file its own motion to introduce evidence of other bad acts in accordance with the scheduling order to which it agreed. Instead, the State has elected to simply respond to Montgomery’s motion to exclude evidence of same and couch much of the evidence it seeks to introduce as “intrinsically intertwined” with the acts charged and therefore immune to New Hampshire Rule of Evidence 404 and its prerequisites. See State’s Partial Objection to Defendant’s Motion in Limine – Allegations of Prior or Subsequent Bad Acts (hereinafter “State’s Partial Objection”) at ¶ 16, 28, 32.

6. The State attempts to seize upon the “intrinsically intertwined” exception to introduce evidence that “in the months and weeks prior to Harmony’s death, she appeared to be malnourished and covered in bruises,” presumably due to Montgomery’s conduct. See id. at ¶ 16. It seeks to introduce evidence that Montgomery’s “increasing drug use led to homelessness which lays the foundation for why the defendant and his family were living in a vehicle.” See id. at ¶ 28. It also seeks to introduce evidence that Montgomery blocked Crystal Sorey’s phone number and stopped answering her messages and calls after Sorey last saw Harmony Montgomery during a Facetime call in April 2019, eight months prior to Harmony’s death. See id. at ¶ 32.

7. The purpose of Rule 404(b) is to “ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based upon evidence of other crimes or wrongs.” State v. Papillon, 173 N.H. 13, 28 (2020)(quotation omitted). “The intrinsic evidence exception ‘cannot serve as a backdoor to circumvent’ this purpose.” Id. (quoting United States v. Gibbs, 797 F.3d 416, 423 (6th Cir. 2015)). “This type of evidence is admissible under the rationale ‘that events do not occur in a vacuum, and the jury has a right hear what occurred immediately prior to and subsequent to the commission of the charged act so that it may realistically evaluate the evidence.’” Papillon, 173 N.H. at 25 (quoting State v. Wells, 166 N.H. 73, 78 (2014)(emphasis added)). Other criminal act evidence admissible as part of the “intrinsically intertwined”

exception “must be confined to that which is reasonably necessary to accomplish such purpose.” Papillon, 173 N.H. at 27 (quotation and emphasis omitted). “The State may not employ a trial strategy of introducing evidence which itself creates the necessity for admitting bad acts evidence.” State v. Crosby, 142 N.H. 134, 138 (1997).

8. Here, the evidence described above is not “intrinsically intertwined” with the charged acts but, instead, Rule 404(b) evidence of other crimes or wrongs. Nor does the evidence concern acts immediately prior to or subsequent to commission of the charged acts. Because the above evidence is Rule 404(b) evidence that has not been noticed or even the subject of an affirmative filing by the State, it should be excluded.

9. The State’s request to introduce evidence that, “in the weeks and months prior to Harmony’s death, she appeared to be malnourished and covered in bruises,” suffers an additional deficiency. It lacks the specificity required to give Montgomery proper notice prior to an evidentiary hearing. Though the State declares that “multiple witnesses” will testify to such claims, see State’s Partial Objection at ¶ 16, it is not apparent from the discovery who these witnesses, and what these acts, are. Indeed, Kayla Montgomery herself told the police during her June 3, 2022 proffer that, aside from the charged second degree assault, she did not see any injuries on Harmony until the family was homeless and living out of the Chrysler Sebring. See Transcript of 6/3/22 proffer 1st half at 67.

10. Regarding the State’s claim that Harmony was malnourished, her weight of thirty-five pounds was recorded in June 2019, approximately six months prior to death, when she went to the doctor for impetigo. See State’s discovery at Bates Stamp 60. No alarm was raised by medical personnel that, at that weight, for her size, she was malnourished. According to Kayla, at the time of death, Harmony weighed approximately sixty to sixty-five pounds. See Transcript of 6/3/22 proffer 2nd half at 15. When an officer for the Division of Children, Youth and Families visited the Montgomery family in the fall of 2019, approximately two to three months prior to Harmony’s death, the children, Harmony included, were happy, healthy, and fine. See Transcript of 6/23/22 proffer at 5. Without the evidence’s proponent, the State, proffering particularity regarding the purported acts of neglect and assault, Montgomery is unable to address the State’s generalized assertions.

11. The same applies to the State’s assertion that domestic violence allegedly perpetrated by Adam against Kayla constitutes part of the tampering with witnesses or informants charge. See State’s Partial Objection at ¶ 8 (“The State anticipates that Kayla will testify that she provided false statements due to the abuse, threats, and conditioning she suffered at the hands of the defendant, and the fear he instilled in her that should she report his criminal acts, he would harm her.”) Kayla, herself, however, repeatedly told the police that Adam did not threaten her. See Transcript of 6/3/22 proffer 1st half at 22, 31, 53. In fact, Kayla told police that when she implored Adam to return from Maine to deal with the police in December 2021, he told her to stick with the story that he had returned Harmony to her mother. See id. at 53. The police then specifically asked if he had ever threatened her at that time, “[s]aying ‘you know if you don’t I’ll kill you’ or anything along those lines.” See id. Kayla responded, “No.” See id.

12. Notably, the evidence upon which the State relies for admissibility was gathered post-indictment. Though Adam was indicted in January 2023, the evidence the State now uses and even attaches to its pleading as an exhibit is a transcript of a third proffer session with Kayla Montgomery that occurred on March 16, 2023, two months after indictment. See State’s Partial Objection Exhibit 1. The generalized claims of domestic violence advanced by the State, even if true, fail to differentiate between acts relating to the purpose of inducing Kayla to inform or testify falsely and acts perpetrated without such a clear nexus. See State v. Davidson, 163 N.H. 462, 469 (2012)(there must be “clear connection between the particular evidentiary purpose articulated and the other bad acts.”)(citation omitted). For the defense to meaningfully address the State’s broad claim of admissibility, the State must first proffer each purported act and, without invoking propensity, its clear relation to the witness tampering charge.

WHEREFORE, Adam Montgomery respectfully requests this Honorable Court:

- (a) Schedule an evidentiary hearing;
- (b) Compel the State, prior to the evidentiary hearing, to articulate with particularity its assertions of neglect and assault regarding Harmony Montgomery, including the non-propensity purpose for which its assertions are being offered;
- (c) Compel the State to specify each and every act of purported domestic violence connected to the witness tampering charge;
- (d) Exclude all Rule 404(b) evidence due to lack of notice and proper pleading; and
- (e) Grant such other and further relief as deemed fair and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this pleading has been forwarded to Senior Assistant Attorney General Benjamin J. Agati and Assistant Attorney General R. Christopher Knowles on this 12th day of January 2024.

/s/ Caroline L. Smith
Caroline L. Smith, Esq.